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Public Prosecutor v Taiko Fertiliser & Ors

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HIGH COURT (JOHOR BAHRU) — CRIMINAL APPLICATION NO 44–15–05 OF 2015
MOHD SOFIAN J
26 JANUARY 2017

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Criminal Procedure — Forfeiture — Customs and excise — Applicant applied for forfeiture of respondents' monies and cars pursuant to ss 56 and 61 of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('the AMLATFA') — Trial against third respondent pursuant to s 135(1)(g) of the Customs Act 1967 ('the CA') still pending in magistrate court — Whether offence under s 135(1)(g) of the CA and s 4(1) of the AMLATFA proven — Whether all essential requirements under s 56(1) of the AMLATFA established on balance on probabilities — Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ss 4(1), 56 & 61 — Customs Act 1967 s 135(1)(g)

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This was an application by the applicant pursuant to ss 56 and 61 of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('the AMLATFA') for an order of forfeiture of monies of the respondents in seven accounts in various banks in the sum of RM280,419.73 and also two units of vehicles namely a BMW model X6 and one unit of AUDI model TT. The application was grounded on the fact that said properties were obtained as a result of or in connection with an offence under s 4(1) of the AMLATFA. In support of the application, the applicant relied on the affidavits of the investigating officers namely Ibrahim Md Noh ('affidavit IMN'); and Nor Azman bin Mat Jini ('affidavit AMJ'). In relation to the said offence, there was a trial pursuant to s 135(1)(g) of the Customs Act 1967 ('the CA') against the third respondent which was still pending at the magistrate court.

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Held, dismissing the application:

(1) The fact that the trial against the third respondent before the magistrates court was still pending under s 135(1)(g) of the CA was without more, not sufficient to prove the predicated offence under s 135(1)(g) of the CA, hence the offence under s 4(1) of the AMLATFA. Since the offence was not proved, the court would not make an order of forfeiture of the monies seized and frozen and the two units of the vehicles seized (see paras 17 & 22).

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(2) In the instant case, the applicant was relying heavily on the affidavit evidence of both investigating officers who had sworn affidavits in support which were marked as 'IMN' and 'AMJ' respectively which in

substance was purely hearsay. The burden of proof was on the balance of probabilities and it must be discharged by the applicant which the court found that the applicant had failed to do so. In the upshot, the applicant had failed to prove the case on the balance of probabilities that the entire essential requirement in s 56(1) of the AMLATFA had been established (see paras 23 & 26–27).

[Bahasa Malaysia summary

Ini adalah permohonan oleh pemohon menurut ss 56 dan 61 Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 ('APPWH') untuk perintah rampasan wang responden-respodnen dalam tujuh akaun dalam pelbagai bank yang berjumlah RM280,419.73 dan juga dua unit kenderaan iaitu BMW model X6 dan satu unit AUDI model TT. Permohonan itu berasaskan fakta bahawa hartanah-hartanah tersebut telah diperoleh akibat atau berkaitan kesalahan di bawah s 4(1) APPWH. Bagi menyokong permohonan itu, pemohon bergantung kepada afidavit-afidavit pegawai-pegawai siasatan iaitu Ibrahim Md Noh ('afidavit IMN'); dan Nor Azman bin Mat Jini ('afidavit AMJ'). Berhubung kesalahan tersebut, terdapat perbicaraan menurut s 135(1)(g) Akta Kastam 1967 ('AK') terhadap responden ketiga yang masih belum selesai di mahkamah majistret.

Diputuskan, menolak permohonan:

(1) Fakta bahawa perbicaraan terhadap responden ketiga di hadapan mahkamah majistret masih belum selesai di bawah s 135(1)(g) AK adalah tidak mencukupi untuk membuktikan kesalahan predikat di bawah s 135(1)(g) AK, justeru kesalahan di bawah s 4(1) APPWH. Oleh kerana kesalahan itu tidak dibuktikan, mahkamah tidak membuat perintah perampasan wang yang dirampas dan dibekukan dan dua unit kenderaan yang dirampas itu (lihat perenggan 17 & 22).

(2) Dalam kes ini, pemohon bergantung kepada afidavit keterangan kedua-dua pegawai siasatan yang memberi akuan sumpah afidavit sokongan yang ditandakan sebagai 'IMN' dan 'AMJ' masing-masingnya yang hanya dengar cakap. Beban bukti adalah atas imbangan kebarangkalian dan ia perlu dilepaskan oleh pemohon yang mana mahkamah mendapati bahawa pemohon telah gagal berbuat sedemikian. Oleh demikian, pemohon telah gagal untuk membuktikan kes atas imbangan kebarangkalian bahawa keseluruhan keperluan penting dalam s 56(1) APPWH telah dibuktikan (lihat perenggan 23 & 26–27).]

Notes

For cases on customs and excise, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2520–2525.

Cases referred to

Awalluddin bin Sham Bokhari v Public Prosecutor [2016] MLJU 1728; [2016] 2 AMR 20, CA (folld)
Pendakwa Raya v Victory Connection & 2 Others [2014] MLJU 1778; [2015] 6 CLJ 125, HC (refd)
Public Prosecutor v Billion Nova Sdn Bhd [2016] MLJU 1823; [2016] 4 MLRA 266, CA (refd)

Legislation referred to

Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ss 3(1), 4, 4(1), (1)(a), 50(1), 56, 56(1), (2), 61, 61(2), Second Schedule
Customs Act 1967 ss 78, 119, 135(1), (1)(g), (1)(iii)(aa), 155(1)(c)
Customs Duty Import Order 2008 Schedule 11
Rules of Court 2012 O 41 r 5

Norafiah bt Saini (Deputy Public Prosecutor, Johor State Legal Advisor's Office) for the applicant.
Abdul Hamid Menon bin Abdullah (RK Menon & Co) for the respondents.

Mohd Sofian J:

INTRODUCTION

[1] This application by way of notice of motion dated 13 January 2015 was initially filed by the public prosecutor ('the said applicant') at the Kuala Lumpur Criminal Court under Notice of Application No 44–2–01 of 2015. Upon an application by the respondent the matter was transferred to the Johor Bahru Criminal Court and given a new number namely 44–15–05 of 2015 ('the said application'). The applicant filed the said application pursuant to ss 56 and 61 of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (Act 613) ('the AMLATFA') respectively. The applicant has sought from this court for an order of forfeiture of monies of the respondents in seven accounts in the various banks in the sum of RM280,419.73 and also two units of vehicles namely a BMW model X6 bearing registration No JPN 1522 and one unit of AUDI model TT bearing registration No JPU 1522 ('the said properties'). The said application was premised on the fact that the said properties were obtained as a result of or in connection with an offence under s 4(1) of the AMLATFA.

THE AFFIDAVITS FILED IN THIS APPLICATION WERE AS FOLLOWS

[2] (a) an affidavit by learned deputy public prosecutor, Mohd Farez bin

Rahman dated 9 January 2015 ('the affidavit by the DPP');

(b) an affidavit by the Senior Assistant Director of Customs 11, Ibrahim bin Md Noh dated 9 January 2015 ('the affidavit IMN');

(c) an affidavit by the Senior Assistant Director of Customs 11, Nor Azman bin Mat Jini ('the affidavit AMJ'); and

(d) an affidavit in reply by Fareast bin Md Sapry ('the affidavit in reply of the respondent').

SUMMARY OF FACTS

[3] On 9 May 2014, the applicant, by order issued pursuant to s 50(1) of the AMLATFA, directed the investigating officers to seize the monies held in the seven bank accounts in the name of the respondents in the sum of RM280,419.73 and two units of vehicles namely one unit of BMW model X6 bearing registration No JPN 1522 and one unit of AUDI model TT bearing registration No JPU 1522 after the applicant was satisfied that the said properties were obtained related to an offence of money laundering and more specifically, the offence of engaging in a transaction that involved proceeds of an unlawful activity under s 4(1) of the AMLATFA, being an activity constituting a serious offence which was an offence under s 135(1)(g) of the Customs Act 1967 which the applicant seek to show that it is a predicate offence underlying the money laundering offence under s 4(1) of the AMLATFA.

[4] The material facts of the applicant's case could be gleaned from the affidavits of IMN and AMJ in that investigating papers were opened on 28 January 2014 under s 4(1) of the AMLATFA immediately after the order of seizure was issued. The affidavit of AMJ an investigating officer for an offence under s 135(1) of the Customs Act 1967 showed that following the seizure of two containers bearing serial Nos APHU6570310 and FCIU8215129 which contained beer and cigarettes on 24 January 2014. From the SSM search, it revealed that that the containers belonged to Taiko Fertiliser and a digital search also revealed that Loktoi Logistics of whom the third respondent was at all material time the sole proprietor the first respondent and the second respondent respectively. The applicant also revealed that the first and second respondents sole business activity were as forwarding agent and importer of frozen food. The applicant's investigation on the second respondent revealed that it has an address at No 23-1, Jalan Suria 6, Bandar Seri Alam, 81750 Masai, Johor whose main business activity was as a forwarding agent for importers and as consignee for the released of goods at the customs entry point and in the instant case customs clearance at the Pasir Gudang Port, Johor for the first respondent. In the instant case, it was not disputed that the first respondent was at all material time the importer based on the K1 Form. It was

the case for the applicant that the first respondent had wilfully declared in the K1 Form No J15-1-01006900/14 through the forwarding agent, namely the second respondent that the contents of the two containers as 'Granular Rock Phosphate' whereas the contents were prohibited goods which required import permits. The applicant upon also averred that when the two containers were to be inspected by the applicant, the respondent failed to be present thereat although sufficient notice was given to the respondent to witness the opening of the two containers. The applicant also averred that the third respondent had used the computer in the second respondent's office to generate invoices and packing list which were incorrect stating that 'Kayan International Trade' having an address in Cairo, Egypt for the purpose of declaring that the goods in Form K1 were 'Granular Rock Phosphate'. The applicant averred that in container serial No APHU6570310 were 366 mastercase cigarettes with brand names such as Manchester Gold, 164 MC Manchester Red, Promax 180 MC, Promax American Blend 38 MC, 9th Century Menthol 48 MC and A380 40 MC with the Ministry of Health warning 'Prohibition for sale to persons under 18 years old' and also the health warning hazard and has a security mark. The applicant has also sought confirmation from cigarettes manufacturer locally who confirmed that the cigarettes referred to by the applicant were not manufactured by them.

[5] With regard to the other contents in the other container namely bearing registration No FCIU8215129 which contained 1,002 crates of Guniness Stout beer and 2,154 crates of Heineken beer, the duty import for the beers had not been paid in accordance to s 78 of the Customs Act 1967. No valid import permit was tendered pursuant to prohibition on import of the Schedule 11 of the Customs Duty Import Order 2008 pertaining to cigarettes and beer.

[6] The affidavit of IMN, the investigating officer for the alleged offence under s 4(1)(a) of the AMLATFA revealed that for purposes of the application only two units of vehicles namely one unit of BMW model X6 bearing registration No JPN 1522 and one unit of AUDI model TT bearing registration No JPU 1522 were purchased from proceeds of an illegal activity received by the third respondent were sought to be forfeited. The applicant also in this respect had also sought that the monies held in seven accounts in the various banks amounting to RM280,419.73 in the name of the respondents be forfeited.

[7] As for the respondents, the learned defence counsel reiterated that as far as the predicate offence relied upon by the applicant was an offence under s 135(1)(iii)(aa) of the Customs Act 1967 which is pending before the magistrate's court when this court allowed an appeal by the applicant and ordered that the third respondent to enter his defence on the said charge. There was no charge under s 4(1) of the AMLATFA preferred against the third

respondent. Therefore it follows that the applicant has no evidence of any alleged offence under AMLATFA. Learned counsel submitted that the premised upon which the forfeiture order was sought was as a result of an investigation conducted by other investigating officer who was satisfied that the properties seized were connected with an offence punishable under s 4(1)(a) of the AMLATFA which were seized or frozen by the applicant as a result of an alleged offence committed under s 135(1)(g) of the Customs Act 1967. The alleged offence under the Customs Act 1967 were in relation to the contents in the two containers which were declared in the K1 Form as 'Granular Salt Phosphate' which were incorrect. Learned counsel further averred that there was no evidence to show that the third respondent was involved in any smuggling activities in the past so was there no evidence of any conviction against any of the respondents to show that the properties seized and frozen were as a result of an illegal activity such as smuggling.

THE LAW APPLICABLE

[8] Section 135(1)(g) of the Customs Act 1967 states as follows:

> Whoever is in anyway knowingly concerned in any fraudulent evasion or attempt at fraudulent evasion of any customs duty, or in evasion or attempt at evasion of any prohibition of import or export.

[9] Section 4(1) of the AMLATFA states as follows:

> Any person who:
>
> (a) engages in, or attempt to engage in; or
>
> (b) abets the commission of, money laundering commits an offence and shall on conviction be liable to a fine not exceeding RM5 million or to imprisonment for a term not exceeding five years or to both.

[10] Section 3(1) of the AMLATFA defines money laundering as an act of a person who:

> (a) engages directly or indirectly in a transaction that involves proceeds of any unlawful activity;

[11] In s 3(1) of the AMLATFA defines 'unlawful activity' as 'any activity which is related directly or indirectly to any serious offence or any foreign serious offences'.

[12] In the *Second Schedule of the AMLATFA, smuggling under s 135(1)(g) of the Customs Act 1967 is categorised as a serious offence.*

[13] It was the case for the applicant that the properties seized and frozen in

the banks of the respondents was the subject matter of an offence within s 4(1) of the AMLATFA premised on the investigation carried out by IMN and AMJ.

[14] Section 56 of the AMLATFA states as follows:

> (1) Subject to section 61, where in respect of any property frozen or seized under this Act there is no applicant or conviction for an offence under sub-s 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the freeze or seizure, apply to a judge of the High Court for an order of forfeiture of that property if he satisfied that such property had been obtained as a result of or in connection with an offence under sub-s 4(1) or a terrorism financing offence, as the case may be , or is terrorist property;
>
> (2) The judge to whom an application is made under sub-s (1) shall make an order for forfeiture of the property if he satisfied;
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> (a) that the property is the subject matter of or was used in the commission of an offence under sub-s 4(1) or a terrorism financing offence or is terrorist property; and
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> (b) that there is no purchaser in good faith for valuable consideration in respect of the property.
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> (3) Any property that has been seized and in respect of which no application is made under sub-s (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized; and
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> (4) In determining whether or not the property has been obtained as a result of or in connection with an offence under sub-s 4(1) or a terrorism financing offence or is terrorist property, the court shall apply the standard of proof required in civil proceedings.

[15] Section 61(2) of the AMLATFA states as follows:

> (2) The court making the order of forfeiture under section 55 *or the judge to whom an application is made under* subsection 56(1) shall cause to be published a notice in the Gazette calling upon any third party who claim to have any interest in the property to attend before the court on the date specified in the notice to show cause as to why the property shall not be forfeited.

THE DECISION OF THE COURT

[16] The applicant has to prove its case on a balance of probabilities. Such standard of proof for the purpose of the application under s 56(1) of the AMLATFA requires evidence of a smuggling under s 135(1)(g) of the Customs Act 1967 or of an offence under s 4(1) of the AMLATFA before this court could be persuaded to find with any measure of certainty that the monies seized and frozen in the seven accounts in the names of the respondents in banks and the two units of vehicles which were the subject matter or evidence relating to

A the said offence. It requires that the offence must be proved in order for the court to make the forfeiture order.

[17] To prove the offence under s 4(1) of the AMLATFA, the predicate offence under s 135(1)(g) of the Customs Act 1967 had to be proved first. The B fact that the trial against the third respondent before the magistrates court is still pending under s 135(1)(g) of the Customs Act 1967 is without more, not sufficient to prove the predicated offence under s 135(1)(g) of the Customs Act 1967, hence the offence under s 4(1) of the AMLATFA. Since the offence was not proved, the court will not make an order of forfeiture of the monies seized C and frozen and the two units of the vehicles seized. At this juncture the court was of the considered opinion that the presumption under s 119 of the Customs Act 1967 does not apply to forfeiture proceedings under the AMLATFA but applies to the cause of forfeiture under the Customs Act 1967. D The said application by the applicant was under s 56 of the AMLATFA.

[18] In *Public Prosecutor v Billion Nova Sdn Bhd* [2016] MLJU 1823; [2016] 4 MLRA 266 the applicability of ss 56 and 61 of the AMLATFA was discussed by the Court of Appeal. The brief facts of the case were as follows.

E Billion Nova Sdn Bhd ('Billion Nova') imports and exports beers, liquors and cigarettes in Labuan. In its ordinary course of business, it will purchase goods from certain companies in Miri. The goods are intended for sale in Labuan or Langakawi which is another free duty zone. Labuan is a duty free zone and is F located outside of the principal customs area under the Customs Act 1967. The said goods transacted and sold by Billion Nova in Labuan are all free of import duty. However, if the goods are later transported to a principal customs area, then the Customs Act requires import duty to be paid. The public prosecutor (appellant) suspected Billion Nova had sold duty free cigarettes to its customers G in Miri and Kota Kinabalu without accounting for import duty. This allegation was supported by the payments made to Billion Nova's bank account through Public Bank in Miri and Kota Kinabalu amounting to RM1,044,480. It was also alleged that Billion Nova failed to explain why the money does not tally with its internal purchaser's account and statements. However the prosecution H did not show any proof that such payments were made in consideration of the sale of the duty free cigarettes. The prosecution argued that the sale of the cigarettes was a violation of of s 155(1)(c) of the Customs Act 1967 and consequently, it tantamount to a smuggling offence under s 135(1)(g) of the Customs Act 1967. As smuggling offence is prescribed as an unlawful activity I and serious offence under s 4(1) and Second Schedule of the AMLATFA, the prosecution proceeded to seize the monies in Billion Nova's account. However the prosecution did not institute any prosecution against Billion Nova under the AMLATFA, neither were any of the directors or officers of Billion Nova were charged under the Customs Act.

THE COURT OF APPEAL HELD AS FOLLOWS

[19] (a) The most important aspect in this case is whether the sale of the cigarettes were carried out in Labuan. If the sales were made in Labuan and the cigarettes were delivered in Labuan then there is not import duty payable;

(b) applying the civil burden of proof which is on the balance of probabilities, the evidence presented is insufficient to support a conclusion that the monies in question are the proceeds of an unlawful activity;

(c) the prosecution has failed to prove the case on a balance of probabilities that all the essential requirements of s 56 of the AMLATFA have been established which are that an AMLATFA offence has been committed and that the predicated offence of smuggling is proved;

(d) that the cash amount were insufficient to prove the offence under AMLATFA or under the Customs Act 1967; and

(e) since the offence was not proved, the court could not countenance the forfeiture of the money seized and the prosecution's appeal was dismissed.

[20] The court was also referred to the decision in *Pendakwa Raya v Victory Connection & 2 Others* [2014] MLJU 1778; [2015] 6 CLJ 125 a High Court decision where the brief facts are as follows:

> The applicant (public prosecutor) applied under ss 56(1) and 61(2) of AMLATFA for an order of forfeiture of the monies of the first respondent company, Victory Connection Sdn Bhd, amounting to RM940,884.41 held in its Public Bank account. The second and third respondents were directors of the first respondent. The respondent's case was that the money seized in the bank account of the first respondent was the subject matter of an offence within the meaning of s 4(1) of the AMLATFA. The investigating officer's findings allegedly showed that the monies in the said account were deposited or paid by cheque from Miri or Limbang which was located in the principal Customs Area unlike Labuan which was a duty-free area. It was submitted, however, that the first respondent did not produce any genuine book keeping and daily sales records in Labuan that matched the sales in question for which the monies were banked into their account. The prosecution concluded that the probabilities were in favour of concluding that a smuggling offence had been committed by the first respondent and that the monies in the bank account in question were the subject matter of the offence. The court held that the burden on the prosecution (applicant) was merely to prove on a balance of probabilities to support their case that the monies were obtained as a result of or in connection with the offence under subsection 4(1) of the AMLATFA. The court allowed the prosecution's application to forfeit the monies held the Public Bank account.

[21] It is pertinent to note that in the said case, the prosecution did not charge any individual or company upon completion of the investigation.

A Instead the prosecution elected to proceed against the monies of the first respondent company that was held in the Public Bank as a result of or in connection with an offence under s 4(1) of the AMLATFA.

B **[22]** For the purpose of s 56(1) of the AMLATFA it is incumbent for the applicant to prove that the sums of RM280,419.73 seized from the seven bank accounts were proceeds of unlawful activity; that the respondents engaged directly or indirectly in the transactions that involved these proceeds of unlawful activity and since the unlawful activity in the instant case refers to the C predicate offence under s 135(1)(g) of the Customs Act 1967, the applicant has to prove that the said offence had been committed and that import duty had not been paid. If any one of these ingredients is lacking or not established, a forfeiture order cannot be granted. To recapitulate, the case against the third respondent on the charge under s 135(1)(g) of the Customs Act 1967 is still D pending it would not be proper for this court to presume that a case under s 135(1)(g) of the Customs Act 1967 before the magistrate court had been proved as it is still pending.

[23] In the instant case, the applicant was relying heavily on the affidavit E evidence of both investigating officers who have sworn affidavits in support which were marked as 'IMN' and 'AMJ' respectively which in substance was purely hearsay. The burden of proof is on the balance of probabilities and it must be discharged by the applicant which the court found that the applicant has failed to do so.

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[24] The court was guided by the decision in *Awalluddin bin Sham Bokhari v Public Prosecutor* [2016] MLJU 1728; [2016] 2 AMR 20 where brief facts are that the prosecution (applicant) had applied pursuant to s 56(1) of the AMLATFA for the forfeiture of monies held in several accounts and also for the G forfeiture of several vehicles (the properties). The application which was supported by an affidavit who was opposed by the appellant who gave oral evidence as well called witnesses in support of the his defence. The High Court allowed the application and granted the order of forfeiture as prayed for. The appellant appealed against the same on the grounds, inter alia, that the H prosecution had failed to discharge the burden of proving its case on the balance of probabilities.

[25] The issue before the Court of Appeal was whether the High Court had satisfied the first threshold of s 56(2) of the AMLATFA which required the I applicant to prove on a balance of probabilities that the seized properties were the subject matter of or used in the commission of an offence under s 4 of the AMLATFA and whether the High Court had evaluated the appellant's evidence on the balance of probabilities before granting the order of forfeiture. The court held that on the facts the prosecution had relied heavily on para 32

of the investigating officer's affidavit which in substance was purely hearsay. When it relates to affidavit evidence, hearsay evidence to some extent is permissible provided the provision of O 41 r 5 of the Rules of Court 2012 are complied with. The court further held that O 41 r 5 of the Rules of Court 2012 is inapplicable since the application is not an interlocutory application as any orders made by the court will fully dispose of the matter.

[26] In the instant case, the application for forfeiture was also heavily relied upon on the two affidavits of two investigating officers and an affidavit of the learned deputy which in the opinion of the court was hearsay evidence as the order made if granted would be a final order of forfeiture of the monies held in the seven bank accounts and of the two vehicles seized and which would finally dispose of the matter.

[27] In the upshot, based on the reasons as adumbrated above and in the circumstances, the applicant has failed to prove the case on the balance of probabilities that all the essential requirement in s 56(1) of the AMLATFA had been established. The applicant's application is hereby dismissed.

Application dismissed.

Reported by Dzulqarnain Ab Fatar